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File No. 030815-0000

May 12, 2005

John Minan, Esq.
Chairman
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Chairman Minan:

On behalf of National Steel and Shipbuilding Company, we are filing the attached Motion for Continuance requesting that the Board continue the workshop planned for June 1, 2005, and public hearing calendared for June 29, 2005, on the above-captioned tentative order, for the reasons outlined in the motion.

Please contact me if you have any questions or comments.

Very truly yours,

David L. Mulliken
of LATHAM & WATKINS LLP

Cc: John Robertus – Regional Board
Lane McVey – NASSCO
Linda LeGerrette
Janet Keller
Jennifer Kraus
Richard Wright
Alan Barrett
Susan Ritschel
Daniel Johnson
Eric Anderson

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ATHAM & WATKINS

SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

2005 MAY 12 P 4: 42

May 12, 2005

San Diego Regional Water Quality Control Board
Attn: John Robertus
9174 Sky Park Court
Suite 100
San Diego, CA 92123

Re: Procedural Objections to Cleanup and Abatement Order Issued to NASSCO

Dear Mr. Robertus:

On April 29, 2005, Regional Board staff issued a draft Cleanup and Abatement Order ("Draft CAO") to National Steel and Shipbuilding Company ("NASSCO") and other responsible parties concerning sediment at NASSCO's leasehold. In doing so, staff established a seriously flawed and indefensible process for consideration of the Draft CAO that would deprive NASSCO and other responsible parties of their due process rights. Specifically, NASSCO understands that a staff report will not be submitted prior to the workshop scheduled for June 1, or prior to the public hearing scheduled for June 29. NASSCO is shocked that the Regional Board would proceed in this fashion. Staff's proposed process fails to comply with due process standards, and, regrettably is consistent with the Board's changed approach in the last 18 months in dealing with the shipyards. After working closely with the shipyards for several years on the sediment investigation, Regional Board staff ceased substantive communications with NASSCO for more than a year and then issued the Draft CAO without the corresponding staff report. If the Regional Board chooses to proceed in this fashion, NASSCO will not be afforded an opportunity to review, comprehend, and address substantively the analytical path taken by staff to reach the findings and conclusions in the Draft CAO. Therefore, NASSCO strongly objects to the proposed process as violating its fundamental due process rights.

The law in this area is clear. In order for an agency to satisfy minimum due process requirements for an adjudication, such as the present CAO hearing, its decision must be supported by findings, and those findings must be supported by substantial evidence in the record. *Topanga v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974). As *Topanga* points out, the purpose of requiring that findings be supported by the evidence is to "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *Ibid*, at 516.

By issuing its staff report (i.e., staff's analysis of the evidence to support its findings) after the hearing, Regional Board staff will thwart the very purpose of *Topanga*. Had the staff report been issued concurrently with the issuance of the Draft CAO on April 29th, NASSCO would have been able to determine the appropriate issues to address at the workshop on June 1, and at the

LATHAM & WATKINS LLP

hearing on June 29, on the Draft CAO. More importantly, it would have enabled NASSCO to cooperate with the agency to address issues raised in the staff report and Draft CAO during the two-month period between the issuance of the Draft CAO and the June 29th hearing. This is precisely the type of "orderly analysis" mandated by the *Topanga* court, and one which might result in a final Board decision that was satisfactory to all parties involved.

As a result of the process employed by Regional Board staff, the fairness of the CAO proceedings has been irreparably compromised. As discussed above, *Topanga* requires an agency's findings to be supported by substantial evidence in the record. This mandate recognizes a sequential requirement that prohibits the selective inclusion of evidence most favorable to a desired outcome. Under the approach to which the Regional Board staff is currently committed, the staff report will not provide the required basis for the findings and conclusions in the Draft CAO, but will instead become an after-the-fact, *post hoc* rationalization of a results-driven decision that is not grounded in the facts or evidence.

This non-sequential approach must be contrasted to the balanced, informed analysis of the evidence which was pursued over the course of several years with Regional Board oversight during the sediment investigation at the shipyard sites, culminating in the Exponent report (*NASSCO and Southwest Marine Detailed Sediment Investigation, September 2003*). Hence, the current approach is both improper as a matter of law and wholly inconsistent with the role of a neutral agency acting as a resource trustee for the people of California.

At a minimum, had the staff report been issued with the Draft CAO, NASSCO could have narrowed its contentions with the draft order and made a more informed evidentiary submittal to Regional Board prior to the hearing. Similarly, NASSCO would be able to make a more focused and informed presentation to Board members at the workshop and hearing. Both the Board and NASSCO are substantially harmed by staff's decision to proceed in this fashion.

In summary, by failing to issue its staff report revealing the basis of its findings prior to the hearing, Regional Board has deprived NASSCO of its due process rights. Furthermore, by choosing to proceed in this manner, Regional Board staff creates a very real risk of precluding Board members from considering all evidence in the record prior to issuing the final CAO. The Regional Board's non-sequential approach also has failed to provide a proper basis for the Draft CAO. These defects contravene both textbook administrative law and constitutional principles, as well as state agencies' public policy mandate to administer state law in a sound, unbiased fashion.

Very truly yours,

A handwritten signature in dark ink, appearing to read "David L. Mulliken", written in a cursive style.

David L. Mulliken
of LATHAM & WATKINS LLP

LATHAM & WATKINS^{LLP}

cc: David Barker – Regional Board
Lane McVey – NASSCO
John Robertus – Regional Board
David Minan – Regional Board
Lane McVey – NASSCO
Linda LeGerrette – Regional Board
Janet Keller – Regional Board
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6 Attorneys for National Steel and Shipbuilding
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7
8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
9 SAN DIEGO REGION

10
11 **IN THE MATTER OF:**

12 NATIONAL STEEL AND
SHIPBUILDING COMPANY
13 CLEANUP AND ABATEMENT
ORDER NO. R9-2005-0126
14

ORDER NO. R9-2005-0126
FOR
CLEANUP AND ABATEMENT

PUBLIC WORKSHOP
JUNE 1, 2005

PUBLIC HEARING
JUNE 29, 2005

15
16 **MOTION FOR CONTINUANCE
OF PUBLIC WORKSHOP AND HEARING**

17
18
19 **I. INTRODUCTION**

20 National Steel and Shipbuilding Company ("NASSCO") hereby requests a
21 continuance of the hearing on tentative Cleanup and Abatement Order No. R9-2005-0126
22 ("Draft CAO"), which is currently set for June 29, 2005, as well as the associated workshop set
23 for June 1, 2005. This application is made on the grounds that the San Diego Regional Water
24 Quality Control Board ("Regional Board" or "Board") will not issue its staff report within a
25 reasonable period before the workshop and has not provided NASSCO with adequate time to
26 respond to the Draft CAO and otherwise prepare for the June proceedings.

27 For the reasons discussed below, NASSCO requests that the Regional Board issue
28 a complete and detailed staff report that corresponds with the volume and substance of the

1 existing administrative record. In addition, NASSCO requests that the Board hold several
2 workshops to fully address the Draft CAO. The first of these workshops should be held no
3 earlier than 90 days after the Regional Board provides NASSCO a staff report for the Draft
4 CAO, with the subsequent public hearing occurring no sooner than 60 days after the last
5 workshop.

6 **II. ANALYSIS**

7 **A. The Regional Board Must Provide NASSCO With Its Staff Report Before** 8 **Any Proceeding**

9 Although the Regional Board has issued a Draft CAO, NASSCO understands that
10 the Board staff will not submit a staff report prior to the June workshop or public hearing. Such
11 a process violates NASSCO's statutory and due process rights. When an administrative agency
12 renders an adjudicatory decision, "findings are required in order to bridge the analytic gap
13 between the raw evidence and ultimate decision." United States v. State Water Res. Control Bd.,
14 182 Cal. App. 3d 82 (1986) *citing in part* Topanga Assn. for a Scenic Cmty. v. County of Los
15 Angeles, 11 Cal. 3d 506 (1974)). Such findings must be supported by substantial evidence in the
16 record. Topanga, 11 Cal. 3d at 514. By failing to provide NASSCO with its staff report,
17 Regional Board staff has frustrated the mandate of Topanga and its progeny by failing to provide
18 NASSCO with the evidence purportedly supporting its findings.

19 Failing to provide the staff report not only violates Topanga, but more
20 importantly, violates the due process rights of NASSCO. See Mohilef v. Janovici, 51 Cal. App.
21 4th 267, 302 (1996) ("[B]ecause the due process clause ensures that an administrative proceeding
22 will be conducted fairly, discovery must be granted if in the particular situation a refusal to do so
23 would so prejudice a party as to deny him due process.") (internal citations and quotations
24 omitted). Since the Regional Board has not released its staff report, NASSCO is unable to
25 address the manifest evidentiary deficiencies contained in the Draft CAO. This prejudice is
26 amplified because the raw data, tables, and conclusions contained in the Draft CAO are
27 substantially different than those of the September 2003 *NASSCO and Southwest Marine*
28 *Detailed Sediment Investigation* ("Sediment Report").

1 The Regional Board's decision to depart from the established plan for the
2 sediment investigation is itself problematic. However, just as problematic is the failure by the
3 Regional Board to set forth the evidence relied upon in the Draft CAO (and presumably a
4 forthcoming staff report) well in advance of any public debate or hearings to address the Draft
5 CAO. It is clear that the findings and conclusions of the Draft CAO are not supported by the
6 evidence developed over the course of the three-and-a-half year sediment investigation,
7 including the detailed analysis supervised by Board staff and described in the Sediment Report.
8 It is equally clear that the Regional Board has produced no such evidence to NASSCO in the 18-
9 month period since submittal of the Sediment Report. After a lengthy and costly investigation to
10 determine the appropriate remedy, the Board staff has provided no additional evidence which
11 contradicts or even addresses the conclusions of the Sediment Report. Prior to any workshop or
12 hearing on the Draft CAO, the Regional Board staff must disclose any new scientifically
13 defensible evidence developed or considered outside the public process. Moreover, given the
14 Draft CAO's radical departure from the exhaustively documented conclusions of the Sediment
15 Report, it is inconceivable that any meaningful debate could be conducted by the Regional Board
16 without an extended opportunity being provided to the Potentially Responsible Parties ("PRPs")
17 to understand the basis for the findings and conclusions contained in the Draft CAO and to
18 address these findings and conclusions in meaningful evidentiary hearings.

19 It is also inconceivable that the Regional Board would contemplate holding a
20 workshop and hearing as long as the evidentiary bases, if any, remain unrevealed. Despite thirty
21 pages of findings in the Draft CAO, the Board failed to provide even one page of evidence or a
22 staff report describing how staff purports to have reached those findings. The June 1 workshop
23 will not shed any light on the bases of the staff's actions, but will instead be a four-hour
24 reiteration of the (unsupported) findings. No specific period of time is allotted to NASSCO or
25 other PRPs at the workshop to respond to this one-sided panel. Rather, the PRPs may only pose
26 questions between staff presentations and in the short period of time at the end of the agenda
27 (along with members of the general public). Even then the agenda purports to limit the types of
28 questions that may be raised to those that are not controversial.

1 Hence, the proceedings on the Draft CAO are fatally flawed. The Board must
2 provide a meaningful opportunity for a meaningful dialogue between staff and the PRPs for the
3 purpose of illuminating what, if any, evidence on which staff claims to rely upon to purport to
4 justify the seemingly unsupportable conclusions and findings of the Draft CAO. Absent that, the
5 Regional Board proceedings are not only a denial of due process but are an utter mockery
6 equivalent to (or worse than) no hearing at all.

7 **B. A Continuance Is Necessary To Provide NASSCO Time To Prepare For The**
8 **Hearings**

9 Even if the Regional Board issues its staff report before the workshop, procedural
10 due process would be violated if NASSCO is not provided a reasonable and sufficient time to
11 respond to the Draft CAO. The action the Regional Board proposes to take affects the
12 substantive rights of NASSCO, constitutes formal agency enforcement action, and subjects
13 NASSCO and the other PRPs to material risk (on the order of a hundred million dollars) due to
14 the Regional Board's proposed findings of fact and conclusions of law. Consequently, the
15 constitutionally-mandated opportunity to be heard must be meaningful. See generally Matthews
16 v. Eldridge, 424 U.S. 319, 333 (1972) ("The fundamental requirement of due process is the
17 opportunity to be heard at a meaningful time and in a meaningful manner."). To be meaningful,
18 the opportunity to respond requires provision of adequate preparation time. See Kempland v.
19 Regents of University of California, 155 Cal. App. 3d 644, 649 (1984). Accordingly, NASSCO
20 hereby submits this formal request for a continuance to protect its procedural due process rights.

21 The proposed hearing schedule renders it impossible for NASSCO and the other
22 PRPs to exercise their procedural rights in proper fashion. The Regional Board's decision to
23 hold a public hearing on Order No. R9-2005-0126 at the end of June leaves NASSCO and the
24 other PRPs with only two months to respond to and defend against a \$96 million cleanup order
25 and a mere month to prepare for the preceding workshop. Even if the staff report was released
26 immediately, this is clearly an insufficient amount of time to address the complex scientific and
27 legal issues involved in the Draft CAO, particularly because the findings and conclusions in the
28

1 Draft CAO are remarkably different from those of the Sediment Report. There is no discernable
2 basis for the deviations.

3 NASSCO is entitled to a full and fair opportunity to prepare and present a
4 defense, including exercising the rights to offer witnesses and depose and cross-examine those
5 agency personnel involved in this action. Such measures require time. Instead of ensuring that
6 NASSCO and the other PRPs have been provided a full and fair opportunity, the Regional Board
7 adopted procedures that have the pretense of due process but are in reality simply examples of an
8 agency inappropriately going "through the motions." See Kempland, 155 Cal. App. 3d at 650.
9 Accordingly, the Regional Board must continue the proceedings pursuant to this motion.

10 **C. There Is No Risk Of Harm Associated With A Continuance**

11 As discussed above, a decision by the Regional Board to proceed according to its
12 current schedule will result in manifest prejudice to NASSCO and the other PRPs. Additionally,
13 there is no potential prejudice to the Regional Board associated with a continuance. The
14 Sediment Report demonstrates that, contrary to the conclusions of the Draft CAO, there is a
15 thriving benthic community in the Shipyard Sediment Site that is comparable to other areas of
16 San Diego Bay. In addition, the discharges at issue in the Draft CAO are entirely historical;
17 these historical sources of contamination at the shipyard are now strictly controlled by NASSCO,
18 demonstrating both NASSCO's commitment to its environmental responsibilities and the lack of
19 any imminent threat to water quality. Therefore, there is no risk of harm associated with a
20 continuance of the June proceedings.

21 The Regional Board's own conduct in these proceedings is evidence of a lack of
22 any imminent harm. The Regional Board established a multi-year sediment investigation at the
23 shipyards, which schedule would not have been adopted if there had been an imminent threat.
24 Upon completion of the investigation, NASSCO submitted the Sediment Report to the Regional
25 Board in September of 2003. Now, after taking over eighteen months to review that report and
26 issue the Draft CAO, the Regional Board is requiring NASSCO to respond to the Draft CAO in
27 two month's time. The eighteen-month period is evidence not only of a lack of urgency, but also
28 of the amount of time necessary to address the complex issues and facts arising out of the

1 sediment investigation.

2 Moreover, not only is there an absence of harm associated with a continuance,
3 there are significant potential harms that will result from immediate compliance with the Draft
4 CAO. The Draft CAO notes that a removal of 1,200,000 cubic yards of sediment via dredging,
5 which is necessary to reach background levels, is not feasible in part because there would be
6 "harm to beneficial uses from the large-scale dredging (due to physical disturbance of habitat and
7 re-suspension of pollutants into the water column)." The action sought by the Draft CAO --
8 dredging of 885,580 cubic yards of sediment -- would have the same adverse impacts at a similar
9 intensity level.

10 Finally, the broad implications of the Draft CAO favor a continuance. The Draft
11 CAO, which applies to a very small area within the San Diego Bay ("Bay") yet costs \$96
12 million, will serve as a precedent for the rest of the Bay. If applied to all areas containing
13 comparable levels of contamination, cleanup costs will be on the order of \$3 billion, a staggering
14 amount. The Regional Board must continue the proceedings to provide a process consistent with
15 the enormous consequences of the Draft CAO.

16 **III. CONCLUSION**

17 A continuance is necessary for NASSCO to adequately prepare for the workshop
18 and hearing and to protect its substantive and legal rights. Accordingly, NASSCO respectfully
19 requests that the Board provide a complete, detailed staff report that matches, in both volume and
20 substance, the numerous pages of documents in the record (including the Sediment Report) and
21 that justifies the findings of the Draft CAO. NASSCO additionally requests that multiple
22 workshops be held regarding the Draft CAO. These workshops should occur no sooner than 90

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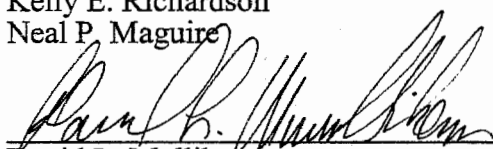
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1 days after the Regional Board provides NASSCO a staff report for the Draft CAO, while the
2 public hearing should be held no earlier than 60 days after the last workshop.
3

4 Dated: May 11, 2005

Respectfully submitted,

5 LATHAM & WATKINS LLP
6 David L. Mulliken
7 Kelly E. Richardson
8 Neal P. Maguire

9 By 
10 David L. Mulliken
11 Attorneys for Respondent
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